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Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Resort Semenanjung Malaysia

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1601–09 OF 2015
DAVID WONG, HAMID SULTAN, UMI KALTHUM JJCA
24 JUNE 2020

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Labour Law — Wages — Minimum wage — Whether hotelier had no right to use service charge fund to top up salaries of employees in order to comply with basic minimum wage requirement — Whether monies in service charge fund did not belong to employer but to the employees who were entitled to a share of it as part of their contractual entitlement — Whether service charge did not form part of employees' basic wages hence any increase in salaries to comply with minimum wage requirement had to come from employer's own coffers

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The Industrial Court ('IC') resolved a trade dispute between the appellant (which managed a hotel) and the respondent by handing down an award that provided for, inter alia, the first collective agreement ('CA') between the appellant and its employees, their salary adjustments and increments, minimum salaries for certain categories of staff and an order that the service charge system be retained for the benefit of employees covered under the CA. By way of a judicial review ('JR') application, the appellant sought to quash the award and ask the High Court to remit the matter back to the IC for rehearing before another panel. In the instant appeal against the dismissal of the JR application, the issues were: (a) whether the appellant could do away with the service charge system and have a 'clean wage system' instead; and (b) if the service charge system had to be maintained, then: (i) whether the appellant could use the service charge fund or a portion thereof to top up its employees' basic wages in order to meet the legal requirement for payment of minimum wages; and (ii) whether the service charge could be distributed to employees who were not within the scope of the respondent's representation. The respondent objected to the 'clean wage system' saying its introduction would reduce the take-home salaries of employees who were on the service charge system. The respondent also said entitlement to the service charge fund was part of the remuneration package of the employees and it was wrong for the appellant to use that fund to pay the minimum wages which should rightly come out of the appellant's coffers. The appellant, on the other hand, argued that until the service charge was paid to the employees, it was money that belonged to the appellant which it could use to raise the salaries of employees to meet the minimum-wage requirement.

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Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) The decision of the High Court did not suffer from any illegality and/or irrationality, as alleged by the appellant, to merit appellate intervention. The High Court had arrived at its decision after careful consideration of all relevant matters. A reasonable tribunal similarly circumstanced would have come to the same decision on the same facts (see paras 41–43).

(2) The monies in the service charge fund did not come from the employer but from customers who had paid an additional 10% of their bills under the supposition that it was going to the employees in lieu of tips. The employees of the appellant were entitled to a share of the service charge as this was their contractual entitlement. Service charge was part of the total remuneration package of the employees and did not form part of their basic wages. The appellant's proposal to replace the service charge system with a 'clean wage system' would be unfair to the employees as it would result in their wages being less than the remuneration agreed upon in their contract of service. This was certainly not the intention of the Minimum Wages Order 2012 ('the MWO') (see paras 30–31, 36 & 40).

(3) It would be wrong for the appellant to use the service charge fund to meet its obligation to pay basic minimum wages to its employees as that would be akin to using the employee's monies to pay their salaries. The salaries of the employees had to come from the appellant's coffers. The service charge monies did not belong to the appellant and could not be utilised by it for any purpose other than what it was intended for. Allowing the appellant to utilise the money from the service charge pool to meet the minimum wage requirement would offend the intention of the MWO which was to improve the standard of living of the work force in the country (see paras 35 & 39).

[Bahasa Malaysia summary

Mahkamah Perusahaan ('MP') menyelesaikan pertikaian perdagangan antara perayu (yang mana menguruskan hotel) dan responden dengan membenarkan award yang memperuntukkan, antara lain, perjanjian kolektif pertama ('PK') antara perayu dan pihak pekerjanya, pelarasan dan kenaikan gaji mereka, gaji minimum berdasarkan kategori kakitangan tertentu dan perintah agar sistem caj perkhidmatan dikekalkan untuk manfaat pekerja yang dilindungi di bawah CA. Melalui permohonan semakan kehakiman ('SK'), perayu memohon untuk membatalkan awad tersebut dan memohon Mahkamah Tinggi untuk mengembalikan perkara tersebut ke MP untuk dibicarakan di hadapan panel yang lain. Dalam rayuan semasa terhadap penolakan permohonan JR, isu-isu adalah: (a) sama ada perayu dapat menghilangkan sistem caj perkhidmatan dan memiliki 'sistem upah bersih' sebaliknya; and (b) sekiranya sistem caj perkhidmatan terus dikekalkan, maka: (i) sama ada perayu dapat

menggunakan dana caj perkhidmatan atau sebahagian daripadanya untuk menambah gaji pokok pekerjanya untuk memenuhi syarat pembayaran gaji minimum; dan (ii) sama ada caj perkhidmatan dapat diagihkan kepada pekerja yang tidak berada dalam skop perwakilan responden. Responden membantah 'sistem upah bersih' dengan menyatakan bahawa pengenalannya akan mengurangkan gaji balik pekerja yang menggunakan sistem caj perkhidmatan. Responden juga mengatakan bahawa kelayakan untuk dana caj perkhidmatan adalah sebahagian daripada pakej saraan pekerja dan adalah salah bagi perayu untuk menggunakan dana tersebut untuk membayar gaji minimum yang sepatutnya keluar dari poket perayu. Perayu, sebaliknya, berpendapat bahawa sehinggalah caj perkhidmatan dibayar kepada pekerja, wang tersebut adalah milik perayu yang mana dapat digunakannya untuk menaikkan gaji pekerja bagi memenuhi syarat gaji minimum.

Diputuskan, menolak rayuan dan mengekalkan keputusan Mahkamah Tinggi:

(1) Keputusan Mahkamah Tinggi tidak lari dari sebarang ketidakadilan dan/atau tidak rasional, seperti yang didakwa oleh perayu, sebagai merit rayuan. Mahkamah Tinggi telah mengambil keputusannya setelah mempertimbangkan dengan teliti semua perkara yang berkaitan. Tribunal yang adil juga akan membuat dapatan yang sama dengan fakta tersebut (lihat perengan 41–43).

(2) Wang dalam dana caj perkhidmatan bukan berasal dari majikan tetapi dari pelanggan yang telah membayar tambahan 10% dari bil mereka dengan anggapan bahawa ia akan diberikan kepada pekerja sebagai ganti upah. Pekerja perayu berhak mendapat sebahagian daripada caj perkhidmatan kerana ini adalah hak kontrak mereka. Caj perkhidmatan adalah sebahagian daripada pakej imbuhan pekerja dan tidak termasuk dalam gaji asas mereka. Cadangan perayu untuk mengganti sistem caj perkhidmatan dengan 'sistem upah bersih' adalah tidak adil kepada pekerja kerana akan mengakibatkan gaji mereka lebih rendah daripada imbuhan yang dipersetujui dalam kontrak perkhidmatan mereka. Ini adalah bertentangan dengan niat 'Minimum Wages Order 2012' ('MWO') (lihat perengan 30–31, 36 & 40).

(3) Ianya adalah salah bagi perayu untuk menggunakan dana caj perkhidmatan untuk memenuhi kewajibannya untuk membayar gaji asas minimum kepada pekerjanya kerana hal itu serupa dengan menggunakan wang pekerja untuk membayar gaji mereka sendiri. Gaji pekerja mesti datang dari poket perayu. Wang caj perkhidmatan bukan milik perayu dan tidak dapat digunakan olehnya untuk tujuan lain selain dari apa yang dimaksudkan. Membenarkan perayu menggunakan wang dari kumpulan caj perkhidmatan untuk memenuhi syarat upah minimum adalah bertentangan dengan niat MWO yang ingin

meningkatkan taraf hidup tenaga kerja di negara ini (lihat perengan 35 & 39).]

Cases referred to

PA Pereira & Anor v Hotel Jayapuri Bhd & Anor [1986] 2 MLJ 1; [1987] 1 CLJ 14, PC (refd)

National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia & Anor v Mahsyur Mutiara Sdn Bhd (Sheraton Langkawi Beach Resort) [2017] 6 MLJ 265; [2018] 1 CLJ 318, CA (refd)

Legislation referred to

Industrial Relations Act 1967 ss 26, 26(2), 30(4), (5)
Minimum Wages Order 2012 O 6
National Wages Consultative Council Act 2011 ss 4(1), 22, 23
Trade Unions Act 1959

Appeal from: Application for Judicial Review No 25–163–09 of / 2014 (High Court, Kuala Lumpur)

Sivabalan Nadarajah (Reena Enbasegaran with him) (Shearn Delamore & Co) for the appellant.

Ambiga Sreenevasan (Shereen Selvaratnam with him) (Sreenevasan) for the respondent.

Umi Kalthum JCA:

INTRODUCTION

[1] This was appeal from the decision of the learned High Court judge in dismissing the appellant's/applicant's judicial review application on 19 August 2015 which, inter alia, sought to quash the Industrial Court Award No 875 of 2014.

[2] The appellant/applicant manages the Crystal Crown Hotel Petaling Jaya which commenced its operations in January 1995.

[3] The respondent is a trade union of employees established and registered under the Trade Unions Act 1959.

[4] Aggrieved by the decision of the learned High Court judge in the judicial review proceedings, the appellant/applicant filed an appeal to this court.

[5] The appellant/applicant and the respondent in this appeal will be referred to as the hotel and the Union respectively.

BACKGROUND FACTS

[6] In 2012, the Minimum Wages Order 2012 ('the MWO') was made as a subsidiary legislation under the National Wages Consultative Council Act 2011 (Act 732). It came into force on 1 January 2013 in relation to an employment establishment with at least five employees.

[7] Initially, when the hotel first commenced its operation sometime in January 1995, there was no collective agreement between the employees and the hotel. The employees' remuneration package consisted of, inter alia, a basic salary and service charge. Then on 12 March 1999 the Union was granted recognition.

[8] A trade dispute had arisen between the hotel and the Union sometime around October 2011 over the hotel's refusal to commence collective bargaining. The collective bargaining was in respect of the terms and conditions to be incorporated in the first collective agreement between the parties.

[9] The hotel's refusal to commence collective bargaining with the Union had resulted in the Union sending a letter dated 16 November 2011 to the Director General of Industrial Relations (DGIR).

[10] In the aforesaid letter, the Union informed the DGIR that a trade dispute existed between the Union and the hotel and sought the assistance of the DGIR to set a meeting to resolve this dispute failing which, the matter be referred to the Industrial Court for an award.

[11] In an attempt to resolve the dispute, the DGIR convened a meeting on 9 February 2012. However, the meeting was unsuccessful. Thus, on 16 February 2012, the Minister for Human Resources referred the dispute to the Industrial Court under s 26(2) of the Industrial Relations Act 1967 ('the IRA').

[12] On 18 July 2014, the Industrial Court made an award and had adopted the Union's proposals. The Industrial Court made the following awards:

(a) the effective date for the first collective agreement is on 1 October 2011;

(b) a 10% salary adjustment from 1 October 2011;

(c) fixed annual increments from RM40 to RM60 up to 30 September 2013;

(d) fixed annual increments from RM60 to RM100 from 1 October 2013;

(e) minimum salaries ranging from RM900 to RM1,300 for the respective job categories as per Appendix B to the award;

(f) a 20-step salary structure be implemented; and

(g) the service charge system be retained and limited to only employees covered under the scope of the first collective agreement.

[13] Dissatisfied with the award of the Industrial Court, the hotel filed a judicial review application seeking, inter alia, to quash the award and for an order of mandamus to direct the matter to be remitted back to the Industrial Court to be re-heard before another panel.

[14] The hotel's application for judicial review was dismissed by the High Court on 19 August 2015 with costs of RM7,000. Hence this appeal.

THE APPEAL

[15] The issues before the court are as follows. First, whether the hotel can implement a clean wage system and remove service charge system. Alternatively, in the event the service charge system is maintained, the second issue is whether the hotel can restructure the wages by utilising the service charge or a portion thereof to top up its employees' basic wages to meet the payment of minimum wages.

[16] The next issue is whether in the event the service charge is maintained, the service charge can be distributed to employees who are not within the scope of the Union representation.

[17] The counsel for the Union contended that the award of the Industrial Court was neither irrational nor illegal. The decision that minimum wages must be paid from the hotel's own coffers instead of from the service charge pool is consistent with O 6 of the MWO.

[18] The Union further contended that the service pool belongs to the employees and that the hotel is not entitled to utilise the service charge funds to help it meet its obligation to provide for the payment of minimum wages to its own employees.

[19] The Union also submitted the service charge system must be retained and the clean wage system must not be implemented. The hotel's obligation to

A increase the minimum wages must not be to the detriment of utilising the money collected for the service charge. In other words, the Union submitted that the hotel must not pay its employees using the money or a portion thereof from money collected from tips to fulfil its obligation to pay minimum wages.

B **[20]** The hotel on the other hand argued that, in light of the implementation of the MWO, the service charge can be incorporated into the basic salary or alternatively, the service charge can be utilised to top-up the basic salary. This is done to bring the basic salary up to the minimum wage requirements under the MWO.

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[21] The hotel also argued that the service charge pool should be extended to all employees who were in receipt of the service charge prior to the coming into effect of the first collective agreement.

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[22] The hotel further argued that the learned High Court judge had erred and had misconceived the role of the Industrial Court in determining a trade dispute under s 26 of the IRA.

E **[23]** The hotel submitted that the learned High Court judge failed to appreciate that the Industrial Court had acted beyond the scope of the provisions of sub-ss 30(4) and 30(5) of the IRA. In doing so, the learned High Court judge had failed to consider the financial ramifications that would result from its award towards the relevant industry, specifically the hotel industry in this matter.

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[24] In support of its contention, the hotel had explained at length to this court that the Industrial Court and the High Court had erred in deciding that service charge did not belong to the hotel but came from the customers.

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[25] Reference was made by the hotel to the decision of the Privy Council in *PA Pereira & Anor v Hotel Jayapuri Bhd & Anor* [1986] 2 MLJ 1; [1987] 1 CLJ 14 where it was stated that service charge, just like the basic salary, is due under the contract of service. As such, it should be treated similarly as a basic salary. Service charge only belongs to the employees as and when it is paid out to the employees but not before that.

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[26] The hotel also submitted that the decision of the Industrial Court and the High Court would result in unjust enrichment and discriminatory practice towards the employer (the hotel) as the employees were already receiving substantial amounts as wages. By refusing the employer to utilise the service charge to meet the new raised basic salaries would result in the employees receiving a financial windfall to the detriment of the hotel.

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OUR DECISION

[27] It is important to note that, based on the provisions of Act 732, the implementation of the minimum wage system must not in any way result in the employees getting anything less favourable than the employees' current wages. The basic restructured wages also must not be less than the amount of wages earned by the employees pursuant to the contract of service.

[28] We were mindful of the decision in *National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia & Anor v Mahsyur Mutiara Sdn Bhd (Sheraton Langkawi Beach Resort)* [2017] 6 MLJ 265; [2018] 1 CLJ 318 where this Court approved the Industrial Court Chairman's explanation on the introduction of the service charge in the hotel industry based on the Privy Council's decision in *PA Pereira*'s case which is to replace the practice of tipping which only benefitted the guest service employees of the hotels but not the other employees who are not in direct contact with the customers or patrons of the hotels. In short, it was a collection system that would benefit all employees and had become the norm in the hotel industry where it forms part of the wages paid to hotel employees.

[29] We further noted the origin of the service charge. The 10% service charge would be levied on the customer's bills and they are paid by the customers. This collection would then be channelled into a fund called the service charge fund where 10% of the collection would be retained by the hotel as administrative charges and the remaining 90% would be distributed to eligible employees of the hotel, subject to the service points allocation agreed by both parties.

[30] We pause here to note that the monies in the service charge fund do not come from the employer. These monies are collected from the customers who paid additional 10% of their bills under the supposition that the 10% is going to the employees in lieu of tips.

[31] We were also of the view that the employees of the hotel are entitled to a share of the service charge as this is their contractual entitlement (see example of contract of service of the hotel's employee, cl 4, p 284, appeal record Vol 2(2)).

[32] The obligation of the hotel to provide for a minimum wage is a separate issue from its obligation to fulfil the contractual entitlement of the employees to a share of the service charge collected.

[33] We were of the view that the clean wage system proposed by the hotel does not tilt the balance in the employees' favour. We viewed the proposal as

being less advantageous to the employees when they are being deprived of the element that the service charge as a separate element of the remuneration.

[34] We were of the view that the introduction of the MWO should not have prevented the employees from receiving the payment of the service charge that they have been receiving since the operation of the hotel in 1995. This payment should have been made over and above their basic minimum wage.

[35] We were also of the view that the salary of the employees should have come from the hotel's coffers. As we had stated earlier, the service charge are monies paid by the customers and the patrons of the hotel in lieu of tipping. Thus, these payments were made under the aforesaid understanding. It would be wrong for the hotel to utilise the monies collected from these payments to assist it in meeting its obligation to pay its employees the basic minimum wages. Paying the employees the basic minimum wages is the hotel's responsibility. The service charge monies were never the hotel's to be utilised for any purpose other than what it was intended for. To use the money for the payment of the minimum basic wages of the employees is akin to using the employees' monies to pay their own salaries.

[36] We also noted that the hotel's proposal to do away with the service charge and introducing a clean wage system is once again unfair to the employees. This proposal, if allowed to proceed, would result in the employees' wages being less than the remuneration agreed in their contract of service. This is obviously unfavourable to the employees and certainly not the intention of the MWO.

[37] The hotel's alternative proposal to the clean wage system is to utilise the service charge fund to meet its obligation to pay the minimum wages. In doing so, essentially what the hotel is trying to do is to escape from its obligation in providing the monies to pay its own employees. The hotel is attempting to comply with the requirements of the MWO without impacting its own finances. This must not be allowed as the hotel should not be entitled to utilise the service charge pool to meets its minimum wages requirement.

[38] It is pertinent to note that the implementation of the national minimum wage will fundamentally have a financial impact on all employers and businesses and the hotel is one of many other employers who would have to bear additional financial responsibility to meet this requirement. Thus, the hotel should not be excluded from fulfilling its obligation like any other employer.

[39] If the hotel is to be allowed to utilise the money from the service charge pool to meet the minimum wage requirement, it would go against the

intention of the introduction of the MWO which is to improve the standard of living of the work force in the country. If the hotel is allowed to do so, it would not only defeat the purpose of MWO but the employees would be placed in a vulnerable position where their take home salary can potentially be lower than what they are currently earning at present.

[40] We found the hotel's contention that the introduction of the minimum wage together with the service charge collection for the employees would be an unjust enrichment of the employees and would have serious financial consequences to the hotel beyond the scope of s 30(4), (5) of the IRA, to be untenable and unsustainable. This contention has already been taken into account by the National Wages Consultative Council (Wages Council) and the Minister/the Government under the provisions of Act 732. To this end, we refer to ss 4(1), 22 and 23 of Act 732 which are self-explanatory and we reproduce below for ease of reference:

4 Functions and powers of the Council

(1) The functions of the Council shall be —

(a) to advise the Government on all matter relating to minimum wages, including its development at the international level;

(b) to make recommendations to the Government on the minimum wages rates and coverage according to sectors, types of employment and regional areas, and other matters relating to minimum wages and wages;

(c) to consult the public on the minimum wages rates and coverage;

(d) to collect and analyse data and information and to conduct research on wages and the socioeconomic indicators;

(e) to coordinate and supervise, and to evaluate the impact of, the implementation of minimum wages;

(f) to review the minimum wages order;

(g) to deliberate on all matters relating to minimum wages;

(h) to disseminate information and analysis on wages; and

(i) to carry out any other functions as it deems fits to enable it to perform its functions effectively or which are incidental to the performance of its functions.'

21 Council to have consultation, etc.

Before any recommendation is made under section 22, the Council shall take the following actions:

(a) have consultation with the public on the minimum wages rates and coverage in such manner as the Minister may determine; and

(b) collect and analyse data and information and conduct research on wages and the socioeconomic indicators.

22 Council to make recommendation

(1) Based on the actions taken under section 21, the Council shall, at such time as the Minister may determine, make a recommendation to the Government through the Minister on the following matters:

(a) the minimum wages rates;

(b) the coverage of the recommended minimum wages rates according to sectors, types of employment and regional areas;

(c) the non-application of the recommended minimum wages rates and coverage to any sectors, types of employment and regional areas or to any person or class of persons;

(d) the commencement of the minimum wages order and the different dates for the commencement of the minimum wages order to different sectors, types of employment and regional areas, or to different persons or class of persons; and

(e) other matters relating to the minimum wages, including the implementation of the recommended minimum wages rates and coverage.

(2) The Government may, after considering the recommendation —

(a) agree with the recommendation; or

(b) direct the Council to review the recommendation within the period as the Government may determine and make a fresh recommendation.

(3) Where the Government directs the Council to review the recommendation and make a fresh recommendation under paragraph (2)(b), section 21 and subsection (1) shall apply.

(4) The Government may, after considering the fresh recommendation made pursuant to subsection (3) —

(a) agree with the fresh recommendation; or

(b) disagree with the fresh recommendation and determine the matters specified in paragraphs (1)(a) to (e).

23 Minimum wages order

(1) Where the Government agrees with the recommendation of the Council under paragraph 22(2)(a) or 22(4)(a) or determines the matters under paragraph 22(4)(b), the Minister shall, by notification in the *Gazette*, make a minimum wages order on the matters specified in paragraphs 22(1)(a) to (e) as agreed to or determined by the Government.

(2) The Minister may, upon the direction of the Government, by notification in the Gazette, amend or revoke the minimum wages order.

In short, we found that service charge is part of the total remuneration package and is not part of basic wages.

[41] As such, we found that the decision of the learned High Court judge did not suffer from any infirmities of illegality and/or irrationality as alleged by the hotel.

[42] We were in agreement with the learned High Court judge that had correctly decided the facts and the laws placed before the Industrial Court did not merit any appellate intervention.

[43] We hereby affirmed decision of the High Court which we found was arrived at after careful consideration of the relevant matters and no irrelevant matters were considered. Thus, we were in agreement that a reasonable tribunal similarly circumstanced would have come to the same decision on the same facts.

CONCLUSION

[44] Thus, after having given consideration to the submissions of both parties, we unanimously dismissed the hotel's/appellant's appeal with costs of RM10,000. The costs of the appeal were subject to the payment of the allocatur's fee and the deposit was to be refunded.

Appeal dismissed and High Court's decision affirmed.

Reported by Ashok Kumar